FILE COPY

No. 468

In the Supreme Court of the United States

OCTOBER TERM, 1931

ROBERT M. LEACH, EXECUTOR, PETITIONER

v.

MALCOLM E. NICHOLS, FORMERLY COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court for the District of Massachusetts (R. 147–157) is reported in 42 F. (2d) 918. The opinion of the Circuit Court of Appeals for the First Circuit (R. 163–174) is reported in 50 F. (2d) 787.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 10, 1931. (R. 163–174.) A petition for rehearing (R. 175) was filed July 9, 1931, and was denied July 22, 1931 (R. 195). The petition

for a writ of certiorari was filed October 19, 1931. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

We contend that the sole question which need be considered is the following:

Whether a District Court may consider a ground for refund of federal estate taxes imposed under the Revenue Act of 1916 when the amended declaration upon which the plaintiff went to trial in that court made no averment that any claim for refund had been filed setting forth that ground, and, as a matter of fact, no such ground was asserted in any claim for refund until after the amended declaration was filed, and more than seven years after the payment of tax, when the taxpayer filed with the Collector what he designated an "amendment to claim for refund."

The petitioner here seeks a review of the following questions:

1. Whether the respondent took procedural steps in the District Court sufficient to permit him to contend in the Circuit Court of Appeals that Massachusetts legacy and succession taxes were not lawful deductions from a decedent's gross estate for the purpose of computing the Federal Estate Tax under the Revenue Act of 1916.

2. Whether such Massachusetts taxes were deductible.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the appendices to this brief, *infra*, pp. 12–17.

STATEMENT

This action was brought in the District Court by the petitioner, as executor, to recover a portion of the Federal estate tax collected by the respondent from the estate of William E. Walker, who died a resident of Massachusetts on November 9, 1918. (R. 20, 163.)

In May, 1919, the executor filed a return and paid an estate tax of $37,700.68. (R. 21, 163.) The Commissioner of Internal Revenue on March 18, 1922, determined that the tax due was $89,735.64. (R. 21.) On March 27, 1922, the additional tax was paid. (R. 22.)

On June 20, 1925, the executor filed a claim for refund of $49,634.70, with interest of $10,423.39 (R. 24–30, 59, 65), setting forth two grounds for the claim, which did not include the contention as to the Massachusetts taxes later asserted. On December 1, 1925, suit was instituted by the executor in the District Court for Massachusetts, and on March 16, 1926, the original declaration was filed in this action, based only upon the two grounds specified in the claim of June 20, 1925. (See R. 164.) The case was tried on this declaration, judgment was entered for the defendant, but was reversed on appeal (23 F. (2d) 275), and the case was sent back for a new trial (R. 3).

On October 8, 1928, the District Court allowed plaintiff to amend his declaration, and he then for the first time claimed deductions from decedent's gross estate for certain matters, including the Massachusetts legacy and succession taxes. (R. 12–16.) In this amended declaration there was no allegation that any claim for refund had ever been filed. The defendant filed an amended answer (R. 19–20), setting up as a defense that in the claim for refund filed June 20, 1925, the deductibility of the Massachusetts taxes was not mentioned and that consequently that claim did not furnish sufficient ground for recovery of any part of the Federal estate tax.

In May, 1929, three years after the time for filing a claim for refund had expired under the statute, and more than three years after this action was brought, and seven months after the filing of the amendment to his declaration (which, of course, did not aver that a claim for refund on the new grounds had been filed), the executor filed with the Collector what he described as an "Amendment to Claim for Refund of Taxes illegally collected," which set up a claim for a refund based upon the deductibility of the Massachusetts taxes and other matters not involved in the instant petition. (R. 55, 65.)

In February, 1930, the case was tried before the District Judge, a jury having been waived in writing. (R. 32–33.) The defendant moved at the opening of the second trial that the action be dismissed

on the ground that the declaration failed to allege that any claim for refund because of the Massachusetts taxes had been filed with the Commissioner prior to the commencement of the action or prior to the date of the amendment to the declaration in September, 1928, and at the close of the evidence the defendant renewed the motion on the ground that the evidence showed that no claim for a refund on the new grounds was presented within four years of the payment of the tax or prior to the bringing of the action or the date of the amendment. (R. 35, 53.)

The District Court disallowed certain deductions claimed, but held that the plaintiff was entitled to recover "to the extent that the tax was increased by the refusal of the Commissioner to deduct the legacy and succession tax paid to the Commonwealth of Massachusetts." (R. 156.)

The respondent appealed from the judgment of the District Court. The Circuit Court of Appeals did not pass on the question whether the claims set up in the "Amendment to Claim for Refund" were barred, but held that Massachusetts legacy and succession taxes were not lawful deductions from a decedent's gross estate for the purpose of computing the Federal Estate Tax under the provisions of Section 203 of the Revenue Act of 1916. (R. 169.)

ARGUMENT

The petitioner's contentions relate to the deductibility of Massachusetts taxes. But regard-

less of the merits of these contentions, we think it so plain that they need not be considered that we oppose the granting of the writ. This position is based on the fact which clearly appears from the record that the petitioner did not file any claim for refund, stating his contentions with respect to the Massachusetts tax until the statutory period for filing claims for refund had expired, and until after the filing in the District Court of his amended declaration on which he went to trial.

This defense was raised by the answer to the amended declaration in the District Court (R. 19), and the facts on which it is based appear in the findings of fact. (R. 54–65.) The question was decided by the District Court adversely to the respondent's contentions. (R. 147, 151–157.) It was duly presented to the Circuit Court of Appeals by proper assignments of error. (R. 158–160.) That Court referred to the question in its opinion (R. 167), but decided the case on the ground that in any event the Massachusetts taxes were not deductible.

The tax in question in this case was paid by the petitioner on March 27, 1922. (R. 22.) On June 20, 1925, the petitioner filed a claim for refund in which two grounds were stated, neither of which related to the present question concerning the Massachusetts taxes. (R. 59, 65.) The present action was commenced on December 1, 1925. (R. 60, 65.) On January 16, 1926, the Commissioner of Internal

Revenue rejected the claim for refund. (R. 60, 65.) On October 8, 1929, the petitioner filed an amended declaration. (R. 12.) In this amended declaration the petitioner asserted for the first time his contention regarding the Massachusetts tax, but there is no allegation in this declaration that any claim for refund had ever been filed or rejected by the Commissioner. On May 3, 1929, the petitioner filed with the respondent an amendment to his original claim for refund, asserting his claim with respect to the Massachusetts taxes for the first time. (R. 55, 65.)

This recital of the facts shows that the petitioner did not comply with the statutory requirements regarding claims for refund. Section 3226 of the Revised Statutes, as reenacted in Section 1113 (a) of the Revenue Act of 1926 (*infra*, p. 15) provides that no suit for the recovery of a tax shall be maintained in any court—

> until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof.

Article 99 of Regulations 68 (*infra*, p. 17) requires that all facts relied upon in support of a claim shall be clearly set forth under oath. The claim for refund filed June 20, 1925, though filed in time, does not set forth any facts in regard to

Massachusetts taxes and makes no mention of the Massachusetts taxes. Under Section 3228 of the Revised Statutes, as amended by Section 1012 of the Revenue Act of 1924 (*infra*, pp. 14–15), and by Section 1112 of the Revenue Act of 1926 (*infra*, pp. 14–15), all claims for refund must be presented within four years after the payment of the tax. In the present case this period expired March 27, 1926. It was not until May 3, 1929, more than three years later, that the petitioner ever filed any claim for refund relying on the ground which he now asserts. And since even this claim was not presented until after the amended declaration in this case was filed, there is no allegation in that declaration with respect to this or any other claim for refund.

Under the decision of this Court in *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269, it is plain that the petitioner is barred from recovering the tax he seeks to recover.

The situation is not altered because the petitioner's claim filed May 3, 1929, was in the form of an amendment to a claim filed June 20, 1925. Although an informal, though valid, claim may possibly be amended after the statutory period has run, it is clear that a new ground for refund can not be added to a claim after the time for filing claims has passed. *Jonesboro Grocer Co.* v. *United States*, 66 C. Cls. 320, certiorari denied, 280 U. S. 562; *Swift & Co.* v. *United States*, 68 C. Cls. 97, 105,

affirmed on another point, 282 U. S. 468; *Art Metal Construction Co.* v. *United States*, 47 F. (2d) 558 (C. C. A. 2d), certiorari denied, 283 U. S. 863; *Zeller* v. *United States*, 46 F. (2d) 1023 (C. C. A. 2d), certiorari denied, 283 U. S. 863. See *Feather River Lumber Co.* v. *United States*, 66 C. Cls. 54, certiorari denied, 279 U. S. 837; *Ordway* v. *United States*, 37 F. (2d) 19 (C. C. A. 2d).

The petitioner argues that the question as to the deductibility of the Massachusetts taxes was not properly before the Circuit Court of Appeals inasmuch as, he contends, the respondent did not take in the District Court the procedural steps which give a party the right to have a point considered by the appellate court. (See his brief, pp. 4–5.) It seems unnecessary now to discuss this matter. The error of the District Court in holding the Massachusetts taxes deductible (assuming it to be error) was one apparent upon the pleadings and upon the facts as found by that court. The outstanding fact is that the Circuit Court of Appeals did consider the matter.

The decision of the Circuit Court of Appeals in the instant case, holding that the Massachusetts taxes are not deductible in computing the gross estate under the Revenue Act of 1916 is squarely in conflict with the decision of the Court of Claims

in *Merrill* v. *United States*, 66 C. Cls. 136, which also dealt with the Massachusetts taxes under the same Act. There are a few cases involving the Massachusetts tax which are still pending. They are not numerous, and the question does not arise under the later Revenue Acts, all of which specifically provide that "estate, succession, legacy, or inheritance taxes shall not be deducted." (See pp. 12–13, *infra*.) There are several cases pending involving the treatment of taxes of other States under the 1916 Act, but a review of the instant case would not be conclusive of those cases inasmuch as this Court has held that it "will follow the decisions of the State courts as to the meaning and proper application of the state transfer tax law." *Keith* v. *Johnson*, 271 U. S. 1, 8. See also *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 270, in which this Court accepted the view that the Massachusetts tax is a tax upon "succession." Cf. *Coolidge* v. *Long*, 282 U. S. 582.

Conclusion

Since we believe it clear that the petitioner can not recover in view of his failure to file a proper claim for refund within the statutory period, we oppose the petition in this case, in spite of the fact that the decision below on the question of the deductibility of the Massachusetts taxes is in conflict with the decision in *Merrill* v. *United States*, 66 C. Cls. 136.

Respectfully submitted.

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NOVEMBER, 1931.

APPENDIX A

STATUTES

Revenue Act of 1916, c. 463, 39 Stat. 756, 778:

> SEC. 203. That for the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a resident, by deducting from the value of the gross estate—
>
> (1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; * * *

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1098:

> SEC. 403. That for the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a resident, by deducting from the value of the gross estate—
>
> (1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, or from theft, when such losses are not compensated for by insurance or otherwise,

and such amounts reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or any estate, succession, legacy, or inheritance taxes;

* * * * *

Revenue Act of 1924, c. 234, 43 Stat. 253, 342, 343:

SEC. 1012. Section 3228 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3228. (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in section 281 of the Revenue Act of 1924, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum.

(b) Except as provided in section 281 of the Revenue Act of 1924, claims for credit or refund (other than claims in respect of taxes imposed by the Revenue Act of 1916, the Revenue Act of 1917, or the Revenue Act of 1918), which at the time of the enactment of the Revenue Act of 1921 were barred from allowance by the period of limitation then in existence, shall not be allowed."

(U. S. C., Title 26, Sec. 157.)

SEC. 1014. (a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 30 days after any such disallowance notify the taxpayer thereof by mail."

(b) This section shall not affect any proceeding in court instituted prior to the enactment of this Act. (U. S. C., Title 26, Sec. 156.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 115:

SEC. 1112. Section 3228 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3228. (a) All claims for the refunding or crediting of any internal revenue tax

alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in sections 284 and 319 of the Revenue Act of 1926, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum.

(b) Except as provided in section 284 of the Revenue Act of 1926, claims for credit or refund (other than claims in respect of taxes imposed by the Revenue Act of 1916, the Revenue Act of 1917, or the Revenue Act of 1918) which at the time of the enactment of the Revenue Act of 1921 were barred from allowance by the period of limitation then in existence, shall not be allowed." (U. S. C., Supp. IV, Title 26, Sec. 157.)

Section 1113 of the 1926 Act (U. S. C., Supp. IV, Title 26, Sec. 156) reenacted Section 3226 of the Revised Statutes as amended by Section 1014 of the Revenue Act of 1924, above quoted.

APPENDIX B

General Laws of Massachusetts (1921), Vol. 1, Chapter 65 (p. 669):

TAXATION OF LEGACIES AND SUCCESSIONS

SECTION 17. An executor, administrator or trustee holding property subject to the tax imposed by this chapter shall deduct the tax therefrom or collect it from the legatee or person entitled to said property; and he shall not deliver property or a specific legacy sub-

ject to said tax until he has collected the tax thereon. An executor or administrator shall collect taxes due upon land passing by inheritance or will which is subject to said tax from the heirs or devisees entitled thereto, and he may be authorized to sell said land, in the manner prescribed by section twenty-one, if they refuse or neglect to pay said tax.

SECTION 18. If a legacy subject to said tax is charged upon or payable out of real estate, the heir or devisee, before paying said legacy, shall deduct said tax therefrom and pay it to the executor, administrator or trustee, and the tax shall remain a lien upon said real estate until it is paid. Payment thereof may be enforced by the executor, administrator or trustee in the same manner as the payment of the legacy itself could be enforced.

APPENDIX C

Treasury Decision 2524 (Treasury Decisions, Internal Revenue, Volume 19, p. 159):

ESTATE TAX—INHERITANCE TAXES

State inheritance taxes not deductible under Title II, act of September 8, 1916—T. D. 2395 of November 17, 1916, revoked

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C., September 10, 1917.

To collectors of internal revenue:

An exhaustive study of the nature of State inheritance taxes has led this office to the conclusion that amounts paid to States on account of inheritance, succession, or

legacy taxes are not "such other charges against the estate as are allowed by the laws of the jurisdiction," and accordingly are not deductible in arriving at the amount of Federal estate tax. T. D. 2395 of November 19, 1916, is hereby revoked.

* * * * *

Treasury Regulations 68 (1924 ed.), relating to Estate Tax under the Revenue Act of 1924:

ART. 99. *Claim for refund.*—A claim may be filed for refund of any tax, interest, or penalty, alleged to be excessive or illegal, where the payment thereof has been made either upon the basis of the return or as a result of the audit and review thereof. Claims for refund must be presented to the Commissioner within four years next after payment of the amount sought to be refunded. Such claim must be made on Form 843. As in the case of a claim for abatement, the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. * * *

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